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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

— and —

BRIEF IN SUPPORT OF PETITION

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THE ARGUS PRESS, SEATTLE

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PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation, *Petitioners*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

---

Puget Sound Power & Light Company, a corporation, and Old Colony Trust Company, a corporation, petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered October 24, 1941 (R. 1877) affirming the judgment of the United States District Court for the Western District of Washington, Northern Division (R. 159).

STATEMENT

This is a proceeding in eminent domain brought by Public Utility District No. 1 of Whatcom County, a municipal corporation of the State of Washington, against Puget Sound Power & Light Company, a Mas-

sachusetts corporation, Old Colony Trust Company, a Massachusetts corporation, and Harris Trust and Savings Bank, an Illinois corporation. During the trial Harris Trust and Savings Bank was, upon stipulation of the parties, dismissed from the proceeding (R. 152, 153). Petitioner Old Colony Trust Company is a mortgagee of the property involved and will receive no further mention herein. Petitioner Puget Sound Power & Light Company will be called the "Company" and the respondent, Public Utility District No. 1 of Whatcom County, will be called the "District."

The action was commenced April 18, 1939, in the Superior Court of the State of Washington for Whatcom County (R. 2-73). On May 6, 1939, the cause was removed to the United States District Court for the Western District of Washington, Northern Division, upon the ground of diversity of citizenship (R. 74-89). Said District Court is hereinafter referred to as the "Trial Court."

The District seeks to condemn the electrical properties owned and operated by the Company in Whatcom County, Washington, together with two transmission lines extending in a southerly direction into adjoining Skagit County. Pursuant to the Washington law and practice (see *Washington ex rel. Grays Harbor Logging Co. v. Superior Court*, 243 U.S. 251) the cause was first heard by the Trial Court upon the issue of public use and necessity, and on July 31, 1939, a decree of public use and necessity was granted (R. 110-144).

On April 30, 1940, the cause came on for trial before the court and a jury (R. 190) for the purpose

of determining the just compensation to be paid the Company (1) for the property to be taken, and (2) for the severance damages to the remainder of the Company's property not taken. The trial continued until August 7, 1940, when the jury returned its verdict in the sum of $5,000,000 (R. 158). Judgment upon this verdict was entered August 24, 1940 (R. 159-162).

The petitioners appealed to the Circuit Court of Appeals from the decree of public use and necessity and from the final judgment upon the verdict of the jury (R. 163). In its opinion filed October 24, 1941, (R. 1832) the Circuit Court of Appeals affirmed the decree and judgment of the Trial Court, the opinion, concurring opinion and dissenting opinion being published at 123 F.(2d) 286. No petition for rehearing was filed.

For a further statement petitioners rely upon the following taken from the majority opinion of the Circuit Court of Appeals (R. 1834-1835):

> "* * * The company's present unified or integrated system of generating, transmission and distribution facilities, is the result of nearly 50 years of development of the electric industry in Western Washington. During that period, the company has become the successor in the operations of 148 predecessor corporations. The company's entire system extends into and serves all or part of 19 counties in Central and Western Washington. It distributes electricity over approximately 4,300 square miles of territory. It has 13 hydroelectric generating plants with a capacity of 202,000 kilowatts and 3 steam plants with a capacity

of 104,500 kilowatts, the energy being transmitted over 1,538 miles of transmission lines, and distributed over 8,900 miles of distribution lines to more than 190,000 customers.

"The company operates in Whatcom County, the boundaries of which are also the boundaries of appellee district. The properties sought by appellee (District) lie in Whatcom County with the exception of two transmission lines extending to substations in Skagit County, and include the entire electric distribution system of the company in the former county, and a small hydro-electric plant of 1750 kilowatts capacity. The properties sought to be taken by appellee (District) serve about 9% of the total customers of the company in all operations, or 17,600, but the only generating system to be taken has sufficient capacity to serve only about 10% of the 17,600 customers in Whatcom County."

JURISDICTION

The jurisdiction of this Court is based upon Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U.S.C.A. Sec. 347).

This petition is timely filed. The judgment of the Circuit Court of Appeals was entered October 24, 1941 (R. 1877). Under Section 8 (a), Act of February 13, 1925 (28 U.S.C.A. Sec. 350) the application for writ of certiorari may be made within three months after the entry of judgment. The fact that the mandate of the Circuit Court of Appeals has already issued to the District Court is immaterial and does not render this application untimely.

The Conqueror, 166 U.S. 110, 113;
Louisville & Nashville R. R. Co. v. Behlmer, 169 U.S. 644;
Carr v. Zaja, 283 U.S. 52, 53.

The jurisdiction of the Circuit Court of Appeals is based upon 28 U.S.C.A. Sections 225 and 230 and the Rules of Civil Procedure, Rule 73.

The jurisdiction of the District Court is based upon 28 U.S.C.A. Sections 41 (1), 71 and 72.

QUESTIONS PRESENTED

The first question relates to the validity of the decree of public use and necessity. The other questions relate to the correctness of certain rulings of the court during the trial on the issue of just compensation.

Public Use and Necessity

1. Where it appears without dispute that an

equivalent system could be built by the District speedily and economically, and that the real purpose of the condemnation is to establish a District-owned monopoly, is the District's determination of necessity for the condemnation arbitrary or capricious?

Elimination of Contractor's Profit

2. Did the Trial Court err in limiting the jury's consideration of an allowance for contractor's profit and expense in the estimate of present reproduction cost of the property?

Severance Damage to Bellingham Office Building

3. (a) Was the witness S. P. MacFadden, as Vice President in charge of all operations of the Company, qualified to testify to the diminution in value of the Bellingham office building caused by the taking of the balance of the Company's property in Whatcom County?

(b) Was the testimony of the witness O. C. Scudder, as to severance damage to the Bellingham office building, based on an incorrect method of estimating the damage?

District's Offer of Wholesale Power Contract

4. Should the jury be permitted to consider in reduction of severance damages the resolution adopted by the District during the trial offering to enter into a five-year contract with the Company for wholesale power at a rate subject to revision by the state regulatory body?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Public Use and Necessity

1. The commissioners of the District adopted a resolution finding that it was necessary to condemn the Company's properties. The evidence shows without dispute that an equivalent system could be built by the District speedily and economically. On the other hand, the District proposes to take the Company's retail distribution system in Whatcom County and leave on the Company's hands the generating capacity built to supply such retail market, thus causing great harm to the Company. The real purpose of the condemnation is to establish a District-owned monopoly in order to eliminate all competition.

The Circuit Court of Appeals held that the determination of the District commissioners was not arbitrary. This is contrary to the law of the State of Washington as established in *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208, and other cases, holding that the question of necessity in condemnation cases is a judicial one and that where great damage will be done to the property owner, with relatively little benefit to the taker, no legal necessity is shown.

Instruction to Eliminate Contractor's Profit

2. The Trial Court instructed the jury that in giving consideration to evidence of any cost of reproduction new studies containing allowances for general contractor's profit it should eliminate any such allow-

ances as were not represented by corresponding savings in material and labor costs. The instruction constitutes an undue limitation on the consideration to be given by the jury to the Company's evidence of reproduction cost and in effect told the jury to eliminate the allowance of about $500,000 for contractor's profit and expense included in the total cost of reproduction new appraisal of the Company's witness N. T. Veatch, Jr.

This is contrary to the following cases, among others: *Cary v. Corporation Commission of Oklahoma* (3-Judge D.C., Okla.) 17 F. Supp. 772, and *Brooklyn Borough Gas Co. v. Prendergast* (3-Judge D.C., N.Y.) 16 F.(2d) 615, 628, 638, which hold that in a reproduction cost estimate it is proper to assume the property would be constructed by a contractor and to allow a reasonable sum for contractor's profit.

Severance Damage to Bellingham Office Building

3. (a) S. P. MacFadden is Vice President in charge of all operations of the Company. His testimony that the severance damage to the Bellingham office building would be $108,000 was stricken by the Trial Court.

In approving such action, the Circuit Court of Appeals refused to apply the Washington rule that a corporate officer occupies the position of owner and is competent to testify to the value of the property of the corporation, as held in *Weber v. West Seattle Land & Improvement Company*, 188 Wash. 512, 63 P.(2d) 418, and *Wicklund v. Allraum*, 122 Wash. 546, 211 Pac. 760, upon the stated ground that the witness

gave not his own opinion but that of experts. As pointed out by Judge Stephens in his dissenting opinion (R. 1871-1872), this is not a fair construction of the witnesess's testimony.

(b) O. C. Scudder, a qualified real estate expert, testified that the diminution in market value of the Bellingham office building caused by the taking would be $108,000. The ruling of the Trial Court striking his testimony was upheld by the Circuit Court of Appeals apparently on the ground that the witness had failed to follow the approved method of proof of damages in condemnation proceedings in that he did not state the value before and after the taking.

This is contrary to the rule in the State of Washington as established in *Seattle & M. Ry. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34, and *King County v. Joyce*, 96 Wash. 520, 165 Pac. 399, which hold that a witness, if properly qualified, may give his opinion as to severance damage without stating the value before and after the taking.

District's Offer of Wholesale Power Contract

4. The District was permitted to introduce in evidence, in reduction of the severance damages to which the Company was entitled, its offer to enter into a five-year contract with the Company for the purchase of electricity wholesale at a rate subject to revision by the state regulatory body.

This is contrary to the Washington Constitution, Article I, Section 16, which provides that the just com-

pensation to which the owner is entitled must be paid in *money*, and to the state law as expressed in *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277, and other cases, holding that a mere offer to assume contractual obligations in favor of the owner cannot be considered on the issue of just compensation. It is also in conflict with the holding of the Eighth Circuit Court of Appeals in *Board of Directors of St. Francis Levee District v. Webb*, 188 Fed. 67, to the same effect.

Divided Court Below

5. This cause was heard by three Circuit Judges, each of whom filed a separate opinion. Judge Haney held that there was no reversible error and that the decree and judgment of the Trial Court should be affirmed. Judge Garrecht concurred in the opinion of Judge Haney but differed as to the ground for upholding the Trial Court's action in striking the testimony concerning severance damage to the Bellingham office building. Judge Stephens filed a dissenting opinion in which he states (R. 1854):

> "My dissent is based upon my conviction that by an instruction given the jury the appellants were erroneously deprived of the benefit of Mr. Veatch's testimony as to the element of contractor's profit in his 'reproduction new' valuation; and that the Court erroneously struck from the record all of the severance damage testimony relating to the Bellingham office building.
>
> "These are substantial items, and if either constitutes error there is no recourse open save reversal."

Judge Stephens was of the view that the judgment should be reversed.

The law established in this proceeding is of great importance. Public utility districts similar to the district involved in this proceeding have been established in thirty counties in the State of Washington as well as in other states. Condemnation actions are pending against this and other public utility companies in Federal and state courts. This is apparently the first of such actions finding its way into the Circuit Courts of Appeals. It involves not only the right to condemn but also other questions which are likely to arise in future trials of this character.

Although there are seven Circuit Judges in the Ninth Circuit Court of Appeals, only two members thereof have set a precedent for the remaining judges. The result may well be different in another appeal if other judges sit. Until the decision of this Court in *Textile Mills Securities Corporation v. Commissioner of Internal Revenue*, October Term, 1941, No. 34, ... U. S. ....., 86 L. ed. (Adv. Op.) 242, there was no method of obtaining a rehearing *en banc* before the Ninth Circuit Court of Appeals because of its ruling in *Lang's Estate v. Commissioner*, 97 F.(2d) 867, that no more than three judges could sit in any case. The *Textile Mills* case was decided by this Court December 8, 1941, after the time had expired for filing a petition for rehearing in the instant proceeding.

This Court should now review the matter and settle the issues raised.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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Old Colony Trust Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation, *Petitioners*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a municipal corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW

The judgment of the United States District Court for the Western District of Washington, Northern Division, was entered August 24, 1940 (R. 159-162). The opinion (R. 1832), concurring opinion (R. 1851) and dissenting opinion (R. 1854) of the Circuit Court of Appeals appear in the record and at 123 F. (2d) 286. The judgment of the Circuit Court of Appeals was entered October 24, 1941 (R. 1877). No petition for rehearing was filed.

II.

JURISDICTION

The jurisdictional statement appears in the preceding Petition for Writ of Certiorari (*supra*, p. 5).

III.

STATEMENT

The essential facts are stated in the preceding Petition for Writ of Certiorari (*supra*, p. 1). Further facts regarding each point will be stated herein.

IV.

SPECIFICATIONS OF ERROR

1. The Trial Court erred in entering the Decree of Public Use and Necessity on July 31, 1939, because it affirmatively appears that the property sought to be taken is not necessary or required by the District.

2. The Trial Court erred in limiting the jury's consideration of an allowance for contractor's profit and expense in the estimate of present reproduction cost of property.

3. (a) The Trial Court erred in rejecting the testimony of S. P. MacFadden, Vice President of the Company, that the severance damage to the Bellingham office building would be $108,000.

(b) The Trial Court erred in striking the entire testimony of the Company's witness, O. C. Scudder, concerning severance damage to the Bellingham office building.

4. The Trial Court erred in reopening the District's case in chief after the close of the Company's evidence to permit the introduction of Resolution No. 37 of the District (R. 1742-1744) which offered to enter into a five-year contract with the Company for purchase of wholesale power at a rate subject to revision by the state regulatory body, and in overruling the Com-

pany's objection to such reopening and to the introduction of such resolution.

V.

ARGUMENT

1. There Is No Necessity for the District to Condemn the Property of the Company.

The District is a municipal corporation organized under the laws of the State of Washington for the purpose (*inter alia*) of selling and distributing electric power. Its territorial limits are coextensive with the boundaries of Whatcom County. On April 17, 1939, its commissioners adopted Resolution No. 24 declaring that the public interest, welfare, convenience and necessity required the establishment by the District of an electric public utility (R. 12). This resolution also declared the estimated cost of acquisition of the Company's property for that purpose to be $3,250,000 (R. 19, 20). On the same day the District adopted Resolution No. 25 authorizing certain attorneys to institute condemnation proceedings to acquire such property, and Resolution No. 26, specifically describing the properties to be condemned (R. 30, 34). All of the Company's easements, rights of way and highway franchises under which it operates its properties are included in the property to be taken (R. 17).

At the hearing on the District's application for a decree adjudging the taking to be a public use and necessity the only showing made by the District on the issue of "necessity" consisted of the above resolutions.

As stated by the Circuit Court of Appeals in the majority opinion (R. 1835):

> "The franchises of the company under which the Whatcom County properties are operated, are not exclusive franchises, and there is no legal obstacle to prevent appellee (District) from operating in the same territory. There is ample room on the highways for appellee (District) to construct another system, which could be built in about a year and a half at a cost not greater than the cost of acquiring the properties in question, according to some of the testimony herein."

The Company contended in the lower courts, and contends here, that the determination of the District commissioners as to the necessity for taking the Company's property was unreasonable and arbitrary. This contention the Circuit Court of Appeals summarily disposed of in the following language (R. 1838):

> "The company argues that the action of appellee (District) was arbitrary because it was unnecessary to take the properties since other competing lines could be built. The argument, however, ignores the fact that it could reasonably be concluded that it was necessary to take existing properties, thus avoiding competition, rather than to build new lines and be faced with competition. We think a reasonable man could take that view, and that therefore the decision of appellee's (District's) commissioners is not arbitrary."

The Supreme Court of the State of Washington has adopted the rule of "reasonable necessity," or as sometimes called, the rule of "comparative necessity."

> *State ex rel. Weyerhaeuser Timber Company v. Superior Court*, 71 Wash. 84, 88, 127 Pac. 591, 592.

Reasonable or comparative necessity means that where great damage will be done to the property owner with relatively little good to the taker, there is a lack of that legal necessity which the law requires.

> *Samish River Boom Company v. Union Boom Company*, 32 Wash. 586, 600, 73 Pac. 670.

Condemnation has been denied by the Supreme Court of Washington in each of the following cases upon the ground that no necessity was shown.

> *Seattle & Montana Railway Co. v. State of Washington*, 7 Wash. 150, 34 Pac. 551;
>
> *State ex rel. Portland and Seattle Railway Co. v. Superior Court*, 45 Wash. 270, 88 Pac. 201;
>
> *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208.

In *State of Washington v. Superior Court*, 128 Wash. 79, 222 Pac. 208, *supra*, the state engineers laid out a state highway on a straight line close to a fruit cold storage warehouse, with the result that the warehouse lost much of its value. Without substantial injury to the proposed highway, it could have been routed farther away from the warehouse. Finding no actual fraud the court nevertheless found arbitrary selection of the route and denied the right of condemnation.

The evidence before the Court here shows without dispute that the property of the Company could be duplicated at reasonable cost and within less time than has already been consumed in prosecuting this condemnation proceeding. There is no legal reason

why the District cannot build its own system. On the other hand, it is proposed by this proceeding to put the Company out of business completely in Whatcom County. The District seeks to take approximately 10% of the Company's total customers or retail market but will leave on the Company's hands almost the entire generating capacity built to supply this market, thereby inflicting large severance damage.

The opinion of the Circuit Court of Appeals significantly points out that the real reason for taking the Company's property is to avoid competition. Such a purpose is nowhere expressed in the Washington statute under which the District was created (Rem. Rev. Stat., Sec. 11605, *et seq.*). A purpose to eliminate private capital from any field of enterprise, and to appropriate such field for a municipal corporation exclusively will not be presumed. Such a legislative intent must be clearly expressed. Moreover, monopolies are prohibited by the constitution of the state. Article XII, Section 22.

The Company also introduced evidence, which is uncontroverted, showing that numerous advantages inhere in the operation of a large unified system such as that owned by the Company. It is more economical to operate; it is able to render better and more continuous service; and most important, it is able to serve at reduced rates. These advantages are not possible in the operation of a single-county property as an isolated enterprise (R. 347, 348, 376-385). Dismemberment of the Company's system, as is being attempted by the Washington Public Utility Districts,

is a step backward economically and is not in the public interest (R. 385, 386).

Since the decision of the Circuit Court of Appeals, war has been declared by the United States on Japan, Germany and Italy and the Pacific Northwest has become one of the theaters of war. The Company's system is a vital defense industry serving numerous governmental and industrial customers directly engaged in the war effort and should therefore be preserved intact.

The disproportion between the benefit to the District on the one side and the damage and injury to the Company and the public generally on the other is so great, and the departure from the Washington rule of necessity is so apparent, that this case should be reviewed by this Court.

2. The Trial Court Erred in Instructing the Jury to Eliminate Contractor's Profit.

On the issue of market value of the property to be taken, both parties introduced evidence of the present cost of reproducing the property. The Company's main witness on this phase of the case was N. T. Veatch, Jr., who made his appraisal on the basis that the work would be performed by a general contractor. He explained why he did so as follows (R. 1147):

> "I used the plan of reproduction by contract because I feel certain that it would be the plan followed by any prudent company in reproducing the property. Any of the other plans would involve what would be equivalent to the contractor taking his first job and taking the job, the first

one, of some five million dollars of property. I don't believe that would be done by a prudent organization."

To the cost of labor and materials, Mr. Veatch added 10% for the compensation and expenses of the contractor and ¾ of 1% for contractor's bond. The witness testified that of the 10% approximately 4% would be required for the contractor's general expenses—his general office expense and his administration expenses—and that the remaining 6% would be profit (R. 1167, 1168, 1295-1298, 1329, 1331).

Inasmuch as his estimate of the total reproduction cost new was $5,356,711, his allowance for contractor's profit and expense amounted to about $500,000 (R. 1153-1154, 1292-1295).

Mr. Veatch testified that in his opinion construction by a contractor was more economical and that the net cost to the owner of the completed project would be less than if some other method were adopted (R. 1299-1302, 1319). He stated it to be the almost universal practice in projects of this size to have the work done by a general contractor (R. 1326-1328). The testimony on this point is more fully set out in the dissenting opinion of Judge Stephens (R. 1857-1861).

The Trial Court instructed the jury that "general contractor's profit and cost of his bond should be included only where the general contractor, if employed would effect corresponding savings to the owner on material and labor costs * * *" and directed the jury

to eliminate from the cost of reproduction estimates any such allowances not represented by such corresponding savings on material and labor (R. 1763). The effect of this instruction is well stated by Judge Stephens in his dissenting opinion (R. 1861, 1862) as follows:

> "The Court, however, in effect instructed the jury to disregard all testimony of the witness relating to the advantages of employing a general contractor for the work other than money savings, over the reproduction new cost without a general contractor and told the jury that the cost of reproduction new by contractor could include compensation to the contractor and cost of bond up to but not beyond the savings on material and labor that he was enabled to make over the reproduction new cost without a general contractor.
>
> "I am of the opinion that this constitutes reversible error. It takes away from the jury all consideration of the testimony to the effect that no prudent owner would construct the properties otherwise than by general contractor, and this in the face of Mr. Veatch's testimony that it is the universal custom to use a general contractor in all sizeable projects. It takes from the jury the question of whether the general contractor method was the only practicable method of construction and would be so considered with all of its elements of cost by the hypothetical willing parties to a purchase and sale."

The majority opinion of the Circuit Court of Appeals fails to meet squarely the issue of the correctness of the instruction but decides the point entirely on two other grounds, namely (1) that the objection made in

the Trial Court was insufficient, and (2) that the instruction was based on Mr. Veatch's testimony on cross-examination. As to ground (1), the majority disregarded the clearly sufficient exception taken by the Company to the instruction (R. 1789, 1790). In this connection Judge Stephens said (R. 1857):

> "I reject the suggestion that the instruction was not sufficiently excepted to."

As to ground (2), the majority opinion relies upon one sentence from the testimony of Mr. Veatch. As pointed out by Judge Stephens, this constitutes a misinterpretation of Mr. Veatch's testimony (R. 1857-1862).

In this fashion the Circuit Court of Appeals approved the instruction which required the jury to eliminate a substantial portion, if not entirely all, of the allowance of about $500,000 for contractor's profit, expenses and bond, included in Mr. Veatch's total appraisal. This is contrary to the holding of numerous decisions of courts and regulatory commissions that in a reproduction cost estimate it is proper to assume the project would be construed by a general contractor and to allow for all elements of cost including a reasonable sum for contractor's profit and expenses. Among such decisions are the following:

Cary v. Corporation Commission of Okla. (3-Judge D.C., Okla.) 17 F. Supp. 772;

Brooklyn Borough Gas Co. v. Prendergast (3-Judge D.C., N.Y.) 16 F. (2d) 615;

Worcester Electric Light Co. v. Attwill (D.C., Mass.) P.U.R. 1929B 1.

3. The Trial Court Erroneously Rejected Testimony Offered by the Company to Prove Severance Damage to the Bellingham Office Building.

The Company owns a building known as the office building in Bellingham, which the District is not seeking to condemn. The Company claims severance damage in the sum of $108,000 by reason of being left with this specially constructed building after the taking of the rest of the Whatcom County properties of the Company. Two witnesses, S. P. MacFadden, Vice President of the Company, and O. C. Scudder, Bellingham realty dealer, gave testimony for the Company on this issue but their testimony was stricken by the Trial Court. There was no other testimony on this point.

It should be noted that neither of the courts below questioned the propriety of the allowance of this item of $108,000 for severance damage. The Circuit Court of Appeals followed its prior ruling in *Puget Sound Power & Light Co. v. City of Puyallup*, 51 F. (2d) 688, which was another condemnation case involving a different part of this same company's system, holding that the company is not only entitled to the "market value of the property taken" but is also entitled to "the damage to its remaining property due to the severance of the property taken" (51 F. (2d) 689). The Trial Court said with respect to this item (R. 1624):

> "What the District is taking in this suit is the system of Whatcom County. Now that system today includes the ownership, operation and maintenance of a building specially built and designed and at all times operated for the particular pe-

culiar service of this system which is being taken. All of the remainder, substantially all of the remainder of the system is being taken except that building. *It is an inescapable inference from all of the evidence in this case that the company will sustain some substantial damages, * * * in the nature of severance damage growing out of the fact that it is left with that specially constructed, specially operated, specially maintained building carved out of that system and left on the respondent company's hands.*" (Italics supplied)

a. *Testimony of S. P. MacFadden*

Mr. MacFadden is Vice President in general charge of all operations of the Company (R. 1351). He testified that in his opinion the severance damage to the Bellingham office building would be $108,000 (R. 1455), but this testimony was stricken upon the ground that he had not shown himself to be qualified to testify to real estate values in Bellingham (R. 1458, 1466, 1468).

The striking of his testimony was erroneous because Mr. MacFadden was clearly qualified to give his opinion on the subject. As Vice President in general charge of all operations of the Company, he occupied the position of owner and therefore need not otherwise qualify in order to give testimony with respect to severance damage to Company property.

Weber v. West Seattle Land & Improvement Co., 188 Wash. 512, 63 P. (2d) 418;

Wicklund v. Allraum, 122 Wash. 546, 211 Pac. 760;

Alaska-Juneau Gold Mining Co. v. Larson (C.C.A. 9) 279 Fed. 420.

In upholding the action of the Trial Court, the Circuit Court of Appeals refused to apply the Washington law as expressed in the foregoing decisions, asserting that the witness gave not his own opinion but that of experts. It is true that Mr. MacFadden employed two real estate experts to assist him in estimating the severance damage to the office building (R. 1463, 1464), but this does not disqualify him from testifying on the subject.

Mr. MacFadden said at one point (R. 1463-1464):

> "I had two competent real estate men determine the figure of $108,000 for me *and after going over it, I agreed it was the proper figure.*" (Emphasis supplied)

Again, he testified with respect to the assistance given him by the real estate experts (R. 1464):

> "Q. Does that serve as the basis of your opinion?
>
> A. Yes, sir, *that and my knowledge of the situation.*" (Emphasis supplied)

For Judge Stephens' dissent on this point, analyzing the evidence, see R. 1870-1872.

b. *Testimony of O. C. Scudder*

O. C. Scudder had been in the real estate business in Bellingham for over twenty years and was generally familiar with the market value of real estate in Whatcom County (R. 1093-1099). In his opinion, the depreciation in market value of the office building by reason of the taking of the remainder of the Whatcom County system of the Company was $108,000 (R. 1583-1585). He explained in detail the special construction features which made the building useful

only as headquarters for the company's electric operations in that district. He stated there was almost no commercial purpose that the major portion of the building could be used for other than its present use (R. 1586-1600).

On cross-examination, Mr. Scudder testified that he had arrived at the $108,000 figure by capitalizing the estimated loss of rental value of $6,480 at 6% (R. 1591, 1610). On redirect examination, he testified that this method is generally followed by members of the real estate profession (R. 1615).

The entire testimony of Mr. Scudder was stricken (R. 1625, 1626) and this ruling of the Trial Court was sustained by the Circuit Court of Appeals for the reason that "Scudder's testimony did not comply with the approved method of proof of damages authorized by the law of Washington in condemnation proceedings" (R. 1841). The Court apparently was of the opinion that the witness must state the value before and after the taking, but cannot himself make the subtraction and testify only to the difference.

The Washington rule is that a witness, if properly qualified, may state how much, in his opinion, the property would be depreciated in value by the taking, without stating the value before and after the appropriation.

Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738;

Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34;

King County v. Joyce, 96 Wash. 520, 165 Pac. 399.

The courts below refused to follow the rule of these Washington decisions. Judge Stephens, in his dissenting opinion, fully discusses this point (R. 1862-1870).

4. The Trial Court Erred in Admitting the District's Offer of Wholesale Power Contract.

That a large, integrated public utility system suffers a severance damage when a portion thereof is condemned has been conceded by counsel for the District throughout this proceeding. The owner's right to compensation therefor is recognized in the Federal Courts.

Monongahela Navigation Co. v. U. S., 148 U.S. 312, 326;

U. S. v. Gettysburg Elec. Ry. Co., 160 U.S. 668;

U. S. v. Powelson (C.C.A. 4) 118 F. (2d) 79, 86;

Puget Sound Power & Light Company v. City of Puyallup (C.C.A. 9) 51 F. (2d) 688.

Three District witnesses estimated severance damage, such estimates being in the neighborhood of $100,000 (R. 821, 955, 1005, 1019). Three Company witnesses were of the opinion that the severance damage would be around $2,000,000 (R. 1454, 1665-1680). One of the major considerations of witnesses on both sides was the probability or lack of probability that the District would buy electric power wholesale from the Company after severance—the District witnesses assuming that the District would continue to do so, and the Company witnesses being of the contrary opinion.

Toward the conclusion of the trial and after the District had closed its case in chief the commissioners of the District adopted a resolution offering to enter into a five-year wholesale power contract with the Company at a rate to be subject to revision by the State regulatory body (R. 1744). Over the Company's objection the District's case in chief was reopened and the resolution was introduced in evidence for consideration by the jury (R. 1741-1745). The purpose was to minimize the jury's award for severance damage. The Circuit Court of Appeals sustained this ruling in these words (R. 1842):

> "Evidence of this nature is admissible. *Puget Sound Power & Light Co. v. City of Puyallup*, 9 Cir., 51 F. (2d) 688, 696. Compare *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277."

The *Puyallup* case referred to merely held that the "probability or possibility" that the condemnor might buy power from the Company could be considered by the jury. It did not involve an offer by the condemnor to enter into a contract to buy power, as does the instant case.

The Circuit Court of Appeals has erroneously interpreted and applied the law of the State of Washington. The "just compensation" to which the owner is entitled must be paid in *money*.

> Washington Constitution, Art. I, Sec. 16;
>
> *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277.

The owner cannot be compelled, against his will, to accept any substitute in lieu of money. An executory

promise by the condemning party in favor of the owner, which has the effect of diminishing or mitigating severance damage, is not admissible in evidence and cannot be considered in reduction of any compensation to which the owner would otherwise be entitled.

Lewis, Eminent Domain, Sec. 756;
State ex rel. Peabody v. Superior Court, 77 Wash. 593, 613, 138 Pac. 277;
In re Seattle, 102 Wash. 286, 288, 172 Pac. 1161;
Blomskog, Erickson & Cotton v. Seattle, 107 Wash. 471, 473, 182 Pac. 571;
Board of Directors of St. Francis Levee District v. Webb (C.C.A. 8) 188 Fed. 67.

In *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277, *supra*, the Washington Supreme Court held that an offer by the city condemnor to grant certain rights to the owner of a street railway after condemnation of a portion thereof could not be considered by the jury on the issue of the amount of severance damages which would be suffered by the owner, and that consideration of such an offer by the jury would be "clearly inimical to the constitutional provision prohibiting the making of compensation for property taken other than in money" (77 Wash. 615). The Court further said (77 Wash. 615, 616):

> "The whole of the property is taken, not a part merely, and the part taken fixes the measure of the compensation. The amount of such compensation cannot be lessened by a tender of something the Railway may not want, and which it must pay for if accepted."

Board of Directors of St. Francis Levee District v. Webb (C.C.A. 8) 188 Fed. 67, *supra*, was a condemnation proceeding brought by the levee district. One of the issues was the amount of damage for obstruction of natural drainage to the remainder of the property which would be caused by the construction of the levee. At the close of evidence the district filed in open court a written offer and agreement to improve the drainage and to permit the court to enter appropriate orders enforcing the obligation. The Eighth Circuit Court of Appeals held that the issue was properly withdrawn from the jury and said (188 Fed. 68):

> "The offer of the levee district was properly disregarded. It does not appear that the plan according to which the condemnation proceeded and the levee was built specified as part thereof permanent means of draining the land. The condemnation was not qualified or limited in that way. When the case was tried the landowner was entitled to an assessment of his damages in money, not in obligations or promises possibly productive of future litigation."

The Circuit Court of Appeals below recognized the probable conflict between its holding and that in the *Peabody* case when it used the word "compare." The Ninth Circuit has refused to follow the Washington law as established in the foregoing decisions and is in conflict with the Eighth Circuit Court of Appeals, as above indicated.

CONCLUSION

The Circuit Court of Appeals has rendered a two to one decision on a matter of great importance to the people of the State of Washington. The decision is in conflict with decisions of other circuit courts of appeals and the courts below have failed to follow the law of the State of Washington as set forth in the State Constitution and decisions of the Supreme Court of the State of Washington. Clearly this calls for an exercise of this Court's power of supervision.

It is respectfully submitted that the Petition for Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation, *Petitioners*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a Municipal corporation, *Respondent*.

Brief of Respondent Opposing Petition for Writ of Certiorari

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In the Supreme Court of the United States

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Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a Municipal corporation,
Respondent.

Brief of Respondent Opposing Petition for Writ of Certiorari

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Ninth Circuit, is reported at 123 Federal (2d) 286.

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Statement of the Case

Like petitioners, we will call the petitioners "the Company" and the respondent "the District."

The District is a municipal corporation organized under Rem. Rev. Stat. of Washington, Sec. 11605 *et seq.*, with boundaries coextensive with Whatcom County, Washington, and with authority to construct and acquire, either by purchase or condemnation, and to operate plants or systems for the furnishing of electrical and water service.

The District instituted this proceeding to acquire by condemnation the electrical generating, transmission and distribution properties of the Company in Whatcom County, and two transmission lines extending therefrom and connecting with substations of the Company in adjoining Skegit County (R. 11).

The cause first came before the Trial Court for hearing on Public Use and Necessity. A Decree was duly entered (R. 110).

Thereafter the cause came on for trial before the District Judge, sitting with a jury, for the purpose of fixing the just compensation to be paid to the Company (1) for the property taken (market value), and (2) for damages, if any, to the property not taken caused by the taking (severance damages.) The trial lasted thirteen weeks; 9,700 pages of testimony was taken and 385 exhibits introduced.

The district's lowest combination of estimates for market value and severance damages at the trial was $2,935,700, its highest $3,023,000; the Company's lowest combination $6,750,000, its highest $7,442,000.

The jury's verdict was $5,000,000, or $1,977,000 higher than the District's highest combination and $1,750,000 lower than the Company's lowest combination, and consequently well within the range of testimony.

Judgment on the verdict was entered August 24, 1940 (R. 159).

The Company appealed from both the decree and the judgment (R. 163.) On October 24, 1941, both were affirmed (R. 1832, 1877).

Questions Presented and Assignments of Error

The Company's statement of questions presented (in its Petition) and its assignments of error (in its Brief) are argumentatively stated and phrased. We will endeavor to make the necessary clarifications below.

The real question here is whether review should be granted under Supreme Court Rule 38 (5) (b). The Company fails to even mention this rule and is not specific as to the provision or provisions thereof upon which it relies. From its "Conclusion" (page 31 of its Brief), however, we infer that it claims that, as to the four points which it raises, the decision of the

Circuit Court of Appeals is either "in conflict with the decision of another Circuit Court of Appeals on the same matter," or that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Examination of the points and cases involved discloses that no such conflict exists, and that the questions raised are not important and involve mostly mere questions of fact which were found adversely to the Company by both courts below.

Argument

(1) Public Use and Necessity

The District is specifically authorized by Washington statute to either construct new properties or acquire existing properties.

> Rem. Rev. Stat. of Wash., Sec. 11610(b).
>
> *Carstens vs. Public Utility District No. 1 of Lincoln County*, 8 Wash. (2d) 136, 111 Pac. (2d) 583.

It has here elected to acquire the Company's existing properties (R. 11).

The finding of its Commissioners as to the necessity for this is binding upon the courts in the absence of arbitrary, capricious or fraudulent action.

> *Tacoma vs. Nisqually Power Company*, 57 Wash. 420, 107 Pac. 199.

State ex rel. Peabody vs. Superior Court, 77 Wash. 593, 138 Pac. 277.

State ex rel, Washington Water Power Company vs. Superior Court, 8 Wash. (2d) 122, 111 Pac. (2d) 577, 582.

Carstens vs. Public Utility District No. 1 of Lincoln County, 8 Wash. (2d) 136, 111 Pac. (2d) 583.

There is no evidence of any such action here. Petitioner's own witness Gillette testified (R 406) that he would not recommend duplication if existing facilities could be acquired.

The Company fails to mention the two recent cases last above cited, which involved the entry of decrees of public use and necessity in condemnation proceedings instituted by public utility districts similar to the District here, and in which parts of a large electric system were being acquired by such districts. As to portions of these properties located outside of the districts and also as to certain non-exclusive franchises proposed to be acquired, the contention was raised that there was no "public necessity." This was rejected by the court in each case.

The Circuit Court of Appeals cites and follows these cases in its decision (R. 1838).

The rule in Washington is that of "reasonable necessity" and not of necessity in the sense of indispensability.

State ex rel. Weyerhaeuser Timber Company

vs. Superior Court, 71 Wash. 84, 127 Pac. 591.

The case of *Seattle & Montana Railway Company vs. State of Washington*, 7 Wash. 150, 34 Pac. 551, cited by the Company on page 17 of its Brief, was determined upon the special provisions of a statute relating to the condemnation of properties by railway companies, which statute has no application here.

The cases of *State ex rel. Portland & Seattle Railway Company vs. Superior Court*, 45 Wash. 270, 88 Pac. 201, and *State of Washington vs. Superior Court*, 128 Wash. 79, 222 Pac. 208, cited by the Company on the same page of its Brief, are based upon statutes which have requirements different than Rem. Rev. Stat. of Wash., Section 9276, applicable here.

See decision Circuit Court of Appeals (R. 1837).)

In each of the above cases great damage to the condemnee could be avoided by slight change in the plans.

Here the Company will suffer no great damage, and none not fully compensated for in the verdict.

The Company's statement that the District's only purpose in acquiring existing properties, rather than constructing competing ones, is to establish a monopoly, is merely its own conclusion drawn from the fact that the District is acquiring such properties rather than constructing others.

Article XII, Section 22, of the Washington State Constitution, prohibiting monopolies and cited by the Company on page 18 of its Brief, has no application here because that section applies only to private monopilies.

Uhden, Inc., vs. Greenough, 181 Wash. 412, 43 Pac. (2d) 983.

Griffiths vs. Robinson, 181 Wash. 438, 43 Pac. (2d) 977.

Wood vs. Seattle, 23 Wash. 1, 60 Pac. 135.

The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals. The Company cites none.

The Company's argument (on pages 18 and 19 of its Brief) as to the claimed advantages of what it calls its "integrated electric system" as compared to the system which the District would establish involves a question that is political in nature rather than legal.

(2) Instruction on Assumed Use of General Contractor in Estimated Cost of Reproduction New of Properties

The trial court did not instruct the jury "to eliminate contractor's profit," as indicated by the Company at page 19 of its Brief. The trial court instructed the jury that contractor's profit might be considered.

In utility valuation proceedings Reproduction Cost New Estimates, based on assumed present conditions and present prices of materials and labor, are per-

mitted on the theory that they will assist in the determination of present value.

In order that they may do this, rather than perhaps confuse or mislead, the underlying concept must be kept clear and consistent.

Generally in such estimates, as here, non-competitive prices for materials and labor, based on mere quotations and catalogue price listings and labor scales, are used, and generous overheads of all kinds added.

Generally construction by the owner is assumed.

Here the Company's witness Veatch assumed construction through a general contractor (R. 1147).

This the Trial Court approved, but cautioned (though the challenged instruction) that the contractor's profit and contractor's performance bond (here 10¾ per cent of previous items in the estimate) should not merely be added to other costs therein (R. 1762, 1763).

This instruction was based upon the testimony of Veatch himself to the effect that the only excuse for introducing a general contractor into such an estimate would be that by so doing a sufficient saving would be made to justify his introduction—that he would have to pay his way (R. 1319).

See opinion Circuit Court of Appeals (R. 1844).

The case of *Cary vs. Corporation Commission of Oklahoma*, 17 Fed. Supp. 772, and *Brooklyn Borough*

Gas Co. vs. Prendergast, 16 Fed. (2d) 615, cited by the Company at page 22 of its Brief, merely hold that it is proper to consider construction through a contractor in such an estimate. In both cases it is stated that such a contractor should pay his own way by savings in other costs. Such holdings are in no way in conflict with the instruction by the Trial Court, but are in harmony therewith. Furthermore, both of these cases are three-judge district court decisions and do not constitute a "decision of another Circuit Court of Appeals" within the meaning of Supreme Court Rule 38(5)(b).

Even if such decisions were so considered, and if they were in conflict with the holding in this case (which they are not), they would not be ground for review, because no federal question is involved.

> *Ruhlin vs. N. Y. Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290.

The Company cites no decision of the Washington Supreme Court.

The attempted review is thus not based upon any difference in decisions between Circuit Courts of Appeals or with any local court, but rather upon the weighing and construction of the testimony given by the Company witness Veatch. What the Company is really asking this Court to do is re-examine that testimony.

The Company contends that use of the phrase "savings * * * on material and labor costs" in the instruction operated to exclude savings in other costs. However, the record shows that at the trial this phrase was used by all parties concerned as including all costs. Veatch himself divided "the total construction" into 60 per cent "material" and 40 per cent "labor" (R. 1302.) This interpretation was adopted by counsel for the Company and used by him in the taking of his fourth exception to the instruction (R. 1789-1790).

The Court will not grant certiorari to review evidence and decide disputed facts.

U. S. vs. Johnson, 268 U. S. 220, 227, 69 Law Ed. 925-926.

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 62 Law Ed. 385.

Layne & Bowler Corp. vs. Western Well Works, 261 U. S. 387, 67 Law Ed. 712.

Simkins, Federal Practice (3d Ed.), Sec. 919.

This is especially true where, as in this case, both courts below found the facts the same way.

Page vs. Arkansas Natural Gas Corporation, 286 U. S. 269, 271, 76 Law Ed. 1096, 1098.

Simkins, Federal Practice (3d Ed.), Sec. 919.

An independent reason why review of this point should not be granted is that the Circuit Court of Appeals based its decision upon the alternative ground that in taking its exception to the instruction before

the Trial Court the Company did not specify the grounds for the exception which it now urges, and is barred from now asserting the same under Rule 51, Rules of Civil Procedure.

See Circuit Court of Appeals opinion (R. 1845).

This holding of the Circuit Court of Appeals as to the effect of failure to comply with Rule 51 is in harmony with the uniform holdings of this Court and of the Circuit Courts of Appeals.

United States vs. United States Fidelity & Guaranty Co., 236 U. S. 512, 59 Law Ed. 696.

New York Life Insurance Co. vs. Melgard, (C. C. A. 7 1935), 74 Fed. (2d) 489.

N. P. Railway Co. vs. Krohne (C. C. A. 9), 86 Fed. 230.

This Court will not grant certiorari where the decision sought to be reviewed has been based in the alternative upon grounds other than that upon which review is sought.

Wise vs. Mills, 220 U. S. 549, 55 Law Ed. 579.

Furthermore, the question presented has no importance beyond the present case.

(3) Striking Certain Opinion Testimony of Witnesses MacFadden and Scudder on Severance Damages to Company's Bellingham Office Building

The rulings under this heading went to the manner and order of proof, rather than to the right to prove.

They dealt with the qualification of witnesses to give opinion evidence.

Here in each instance the witness concerned disqualified himself by his own testimony. (Opinion Circuit Court of Appeals, R. 1839-1842).

(a) Testimony of MacFadden

The witness MacFadden testified that he based his opinion on the reports of others not yet produced, that he accepted these reports wholly, and that he had no personal knowledge of real estate values in Bellingham (R. 1459, 1463-1464.) If the record is consulted it will be noted that at the time the Trial Court sustained the motion to strike Mr. MacFadden's opinion, it indicated that it would receive this opinion after the Company had offered the testimony of the witnesses upon which Mr. MacFadden based his opinion (R. 1465-1466.) This testimony was never produced.

The presumption under Washington law that an owner is qualified to testify on market value does not persist in the face of a disclaimer such as was made here.

The case of *Weber vs. West Seattle Land & Improvement Co.*, 188 Wash. 512, 63 Pac. (2d) 418; Wicklund *vs. Allraum*, 122 Wash. 546, 211 Pac. 760, and *Alaska-Juneau Gold Mining Co. vs. Larson* (C.C.A. 9), 279 Fed. 420, cited by the Company on page 24 of its

Brief, concern personal rather than real property. They are based upon the presumption that an owner is familiar therewith and with the purchase and sale of similar properties so as to qualify him as one having special knowledge with reference thereto. Ordinarily the valuation of real property requires special valuation experience.

Port Townsend Southern Railway Co. vs. Nolan, 48 Wash. 382, 93 Pac. 528.

Wigmore on Evidence, Vol. 1, 2nd Ed. (Contrast, Sec. 716, p. 1134, with Sec. 714, p. 1130).

22 C. J. 586, Sec. 685.

The cases cited by the Company do not hold that the presumption of qualification holds or that it persists, especially in the case of a corporate representative, in the face of a disclaimer of such knowledge and experience.

Company A, 1st Reg. vs. Hughes (N. D. 1923), 193 N. W. 144.

McClure vs. Browns Valley (Minn. 1919), 173 N. W. 672.

Westinghouse Air Brake Co. vs. Pittsburgh (Pa. 1934), 176 Atl. 13.

20 A. J. 751, Sec. 893.

(b) Testimony of Scudder

The measure of severance damages is the depreciation in the market value of property not taken. This is the difference between such value before and after the taking.

Puget Sound Power & Light Co. vs. City of Puyallup, 51 Fed. (2d) 688 (cited at page 23 of Petitioners' Brief).

City of Seattle vs. Lake Union Brick Co., 166 Wash. 278, 6 Pac. (2d) 591.

Sultan W. & P. Co. vs. Weyerhaeuser Timber Co., 31 Wash. 558, 72 Pac. 114.

Seattle and M. R. Co. vs. Roeder, 30 Wash. 244, 70 Pac. 498.

The witness Scudder did not use or apply this measure. He determined severance damages on an entirely different basis, and without any reference to market value whatsoever, either before or after the taking.

His testimony on cross-examination prior to the motion to strike disclosed that he was not using the concept of market value as "the price that would be agreed upon between a willing buyer and a willing seller, neither acting under compulsion" (R. 1625).

The cases of *Seattle & M. Ry. Co. vs. Gichrist*, 4 Wash. 509, 30 Pac. 738; *Ingram vs. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34, and *King County vs. Joyce*, 96 Wash. 520, 165 Pac. 399, cited by the Company at page 26 of its Brief, hold that a witness in testifying as to severance damages may express his conclusion in terms of the amount of the damages, and that he need not leave the mathematical calculation of subtracting "market value after the taking" from "market value before the taking" as a function to be

performed exclusively by the jury. These cases have no application here. They merely go to the form of testimony and do not hold that a witness may determine severance damages wholly without reference to market value before and market value after the taking, nor that he need not give these values when asked for them.

The Trial Court sustained the motion to strike Mr. Scudder's testimony because on cross examination it developed that the witness, having given what was supposed to be his mathematical calculation, had in fact made no such calculation at all. He had not considered the market value of the property either before or after the taking. The figure given by him was not a difference in market value but, as stated by both courts below, something entirely different (R. 1625, 1841).

The record discloses that Mr. Scudder made no attempt to arrive at the price which a willing buyer and a willing seller, neither acting under compulsion, woud agree upon for such building before and after the taking. Instead he arrived at his estimate of severance damages solely by taking the use value of the Company's then occupancy of the building (based upon the assumption that the Company was willing to pay therefor a far greater sum than anyone else) and deducting therefrom what he concluded

would be the rental value thereof as between the owner and a renter after the taking, and capitalizing this assumed difference of $6,480.00 "rent" at 6 per cent. Wholly apart from the vice of capitalization at an assumed interest rate, which is an improper basis for valuation (Orgel on Eminent Domain, Sec. 221, page 475), the computation did not determine the amount which a willing buyer and a willing seller would agree upon.

The questions presented under this heading involve merely the interpretation placed on the testimony of these two witnesses by the Trial Court and a majority of the Circuit Court of Appeals, and call only for the analysis and weighing of such testimony.

These questions have no importance beyond the present case.

(4) Admission in Evidence of the District's Resolution No. 37 Declaring Its Willingness to and Intention of Purchasing Power Wholesale From the Company

This resolution was admitted as bearing on a claimed lessening in the market value (i. e. severance damages) of the Company's remaining properties (its generating and transmission properties outside of Whatcom County) caused by the taking.

The Company claimed that the market value of these remaining properties would be lessened because the Company would no longer be able to dispose of the power which it sold through the facilities in What-

com County, that idle generation and transmission capacity would thus be created, and that it would thus have less use for and be less able to earn on these remaining properties.

Obviously if the Company continued to sell power wholesale to the District it would have the same use for its remaining generating and transmitting facilities after the taking as it had before, and could earn as much thereon. The probability or lack of probability of the District's buying power wholesale from the Company after the taking was thus a proper question for the jury.

> *Puget Sound Power & Light Co. vs. City of Puyallup* (9 C. C. A.), 51 Fed. (2d) 688.
>
> *State ex rel. Washington Water Power Company vs. Superior Court*, 8 Wash. (2d) 122, 111 Pac. (2d) 577.

This is admitted for the purpose of the Company's petition for review here at page 27 of its Brief, but was not so admitted by it in the Courts below.

Certainly a willing buyer and a willing seller dealing with these remaining properties for the purpose of arriving at a price therefor would consider the probability of such purchase, and the attitude of the District with reference thereto. Certainly the market value of such remaining properties with such a prospective power purchaser might be one thing and without such prospective purchaseer another.

The Company's witnesses testified that in their opinion the District did not intend to purchase power wholesale from the Company (R. 1366, 1390-1391).

The District Commissioners adopted Resolution No. 37 declaring the "intention, willingness and desire" of the District to purchase power wholesale from the Company (R. 1743-1744.) The Company's witnesses Sands (R. 1750) and Gilman (R. 1748) on severance damages knew of and considered this resolution. This resolution was admitted as bearing on the question of intention (R. 1713).

No exception to the admission of this resolution was taken by the Company on the ground now urged; that is, that it constituted an effort to make compensation other than in money in violation of Article I, Sec. 16, of the Washington State Constitution. (For exceptions see Record 1741-1742.) Consequently, under the rule and authorities above cited the point is not now properly before this Court. It will be noted that it is not discussed in the opinion of the Circuit Court of Appeals, of which review is here sought.

Lewis on Eminent Domain, Sec. 756, cited by the company at page 29 of its Brief, merely announces the general doctrine that compensation must be made in money.

The cases of *State ex rel. Peabody vs. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277; *In re. Seattle*, 102 Wash. 286, 288, 172 Pac. 1161; *Blomskog*,

Erickson & Cotton vs. Seattle, 107 Wash. 471, 473, 182 Pac. 571; *Board of Directors of St. Francis Levee District vs. Webb* (C. C. A. 8), 188 Fed. 67, cited by the Company at page 29 of its Brief, are not in conflict with the ruling of the Circuit Court of Appeals. In each of those cases the question involved was not one of intent, but an attempt to actually compensate the owner with an agreement or rights which he might not want, and which would constitute making compensation other than in money. In the present case no attempt was made to convey any right to the Company or to bind the District to take any power from the Company. The showing was merely that the District was willing to and intended to buy power from the Company, and this evidence was pertinent as bearing upon the probability of its doing so. It is well settled that evidence of intent offered by a party to an action is admissible if relevant.

Wigmore on Evidence, (2d Ed.), Sec. 581, pp. 580-581.

Mutual Life Ins. Company vs. Hillman, 145 U. S. 285, 36 L. Ed. 706.

20 A. J., Secs. 457, 558, 585, pp. 404, 470, 491.

In *State ex rel. Peabody vs. Superior Court*, 77 Wash. 593, 138 Pac. 277, *supra*, the City of Seattle in condemning certain portions of a railway system offered to grant to the condemnee common user rights over the portion of the tracks taken at a rental to be determined under procedure specified by the Seattle

City Charter. The Washington Supreme Court properly held that the amount of compensation for the property taken "cannot be lessened by a tender of something the railway may not want, and which it must pay for if accepted" (ibid, page 616).

The other two Washington cases cited by petitioners, namely, *In re. Seattle*, 102 Wash. 286, 172 Pac. 1161, and *Blomskog, Erickson & Cotton vs. Seattle*, 107 Wash. 471, 182 Pac. 571, support the admissibility of the resolution in evidence. These cases held that a city seeking to mitigate damages by demonstrating an intent to do certain acts must evidence that intent by some "authoritative official action" and that statements of the city officials are not the best evidence.

In *Board of Directors of St. Francis Levee District vs. Webb* (C. C. A. 8), 188 Fed. 67 *supra*, cited by the Company, a levee district condemned lands for a right-of-way under a plan calling for the construction of a levee, and the condemnee claimed damages for obstruction to drainage which it claimed would result from the proposed plan of construction. The district offered to enter into a stipulation to do such construction work under the future supervision of the court as would eliminate the obstruction, and requested, in return therefor, an instruction to the effect that by reason of such stipulation no severance damages would result. The court points out that the

district had not established that the construction provided for in the stipulation would eliminate the obstruction to dainage, and that the condemnee was entitled to payment in money.

(5) Divided Court and Importance of Questions

The Company points out that the Court below was divided, and that a concurring opinion and a dissenting opinion were filed. Judge Garrecht concurred with Judge Haney, but added a ground for affirmance of the striking of the testimony of the witnesses MacFadden and Scudder (R. 1851-1854.) Judge Stephens dissented on two points only, those referring to the contractor's profit instruction and the striking of the testimony of Messrs. MacFadden and Scudder. In each instance Judge Stephens' opinion was based upon his own analysis and construction of the testimony involved, and his construction was different than that of the Trial Court and Judges Haney and Garrecht. What the Company really asks this Court to do upon these points is to re-examine this testimony and re-determine these facts contrary to the findings of the two courts below.

The Company asserts that the law established in this proceeding is of great importance because there are a large number of public utility districts inovlved in similar proceedings in Washington. This contention is without foundation. The points raised upon which there was a difference of opinion in the Court

below are based wholly upon the interpretation of the evidence and not upon any difference of opinion as to applicable law to facts once determined. All the Court would accomplish by review of the points involved would be a re-examination of the facts as applied to this particular proceeding.

Insofar as the question of public necessity is concerned, the Company cites no instance where this or any other Court has ever held that an election to acquire existing properties rather than to construct competing properties, where authority to do either is granted to a municipal corporation, is arbitrary or capricious. In fact a far better claim could be made out to the effect that it would be arbitrary and capricious to construct a competing system than it would be to acquire existing properties, as extensive damage might thus be done to the owner of the existing properties for which he would have no right to compensation. Where acquisition of existing properties is had, such properties can be taken only after determination and payment of just compensation covering both the market value of the properties taken and the severance damages to any remaining properties not taken caused by the taking.

As to the fourth question, namely, the propriety of the District showing its willingness and intention to purchase power from the Company, the Company itself offered evidence which it claimed established

a lack of such intention and willingness, but urges here that it was improper for the District to offer evidence on this same point.

Conclusion

The division of the Court below was on two of the four questions presented here, and in each instance this division was upon interpretation of evidence only.

The company asserts that the questions presented are important. It may well be that the moving cause for this conclusion on its part lies in

> *State ex rel. Oregon-Washington Water Service Co. vs. Hoquiam*, 155 Wash. 678, 286 Pac. 286, 287 Pac. 670.

pursuant to which it expects during this appeal to retain the earnings from its properties and, at the same time, receive interest at 6 per cent per annum ($822 per day) on the verdict, thus in effect securing double earnings during each day's delay.

The decision of the Court below is not in conflict with the decision of any other Circuit Court of Appeals on any of the points involved or with any decision of the Washington Supreme Court on applicable local law.

The following statement of the Circuit Court below is entitled to notice with reference to the point

before us and the Brief of petitioners taken as a whole:

> "With respect to objections to instructions, the following from *State ex rel, Puget Sound & W. H. Ry. Co. v. Foster*, 84 Wash. 75, 146 P. 154, 155, is pertinent: '* * * * It might be possible to discover technical errors in these rulings of the court were we to notice some few expressions therein without reference to the instruction as a whole: but that the learned trial court plainly conveyed to the jury the thought that the ultimate measure of respondents' damages must be the depreciation in the market value of the remaining portion of their farm in addition to the value of the portions taken seems so plain to us that whatever technical error there may have been in some few expressions of the court, standing alone, it was wholly without prejudice. * * *'" (ibid, pp. 293-294).

It is respectfully submitted that the petition for writ of certiorari should be denied.

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